Supreme Court, U.S.
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NO. 92-1028

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

Roberta McLaren,
Petitioner,

v.

Imperial Casualty & Indemnity Co.
and Special Risks, Inc.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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# PETITIONER'S REPLY BRIEF

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EDITOR'S NOTE

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# LIST OF PARTIES

All parties to the proceeding before the United States Court of Appeals for the Fifth Circuit appear in the present caption.

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to

review that Court's July 6, 1992 Judgment and Opinion in this proceeding. Petitioner's Motion for Rehearing and Rehearing En Banc was denied on August 21, 1992.

I. REPLY TO STATEMENT OF THE CASE.

The Petitioner, Roberta McLaren has correctly stated to this Court the proceedings in the courts below including those matters discovered after judgment were rendered against Officer Taylor.[1]

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[1]Respondent points out that both the District court and the Court of Appeals allude to "hints of collusion" without pointing out anywhere in the record where such occurs. No question of collusion was raised by any of the three parties in the District court. The District Court makes such a statement in its opinion without citation of authority or reference to the record. There are a number of misstatements and omissions in the district Court opinion designed to make Roberta McLaren look bad. (See Appellant's Brief in the Court of Appeals P. 6-10). The Court of Appeals in its second opinion refers to this matter even though it has nothing to do with resolution of the case. (App. B 25, 26) There is no evidence of collusion anywhere in the record, because there was no collusion in this matter. The Petitioner has asked the Court of Appeals to give her an opportunity to defend herself against this false charge that she colluded with her rapist.

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Petitioner was not afforded, by either court the rule requiring that all inferences in a summary judgment proceeding be viewed in a light most favorable to the nonmovant, U.S. v. Diebold, 369 U.S. 654 (1962). Officer Taylor filed an answer, and the Court called the case to trial on June 26, 1989 at which time the Plaintiff settled with the City of Bedford and Defendant Taylor who was proceeding pro se did not appear whereupon a jury was waived and the Court considered testimony, received depositions and testimony and made its award and judgment. (R. 578-79 - civil Docket Sheet 153rd Judicial District Court, Tarrant County, Texas) On November 3, 1989, the Plaintiff requested a hearing to disclose an address of Officer Taylor from the Tarrant County Adult Probation Department Records. It was not until February 6, 1990 that Officer Taylor assigned his cause of action to the Plaintiff. The Texas Supreme Court has upheld such assignments even granted prior to trial where an insurance company denies coverage. American Physicians Insurance Exchange v. Garcia, 36 Texas Supreme Court Journal 406 (January 5, 1993). No hint of collusion occurred in or outside the record in this case and unsupported remarks to that effect serve only to prove the weakness of the court opinions in this case and that rape victims still suffer from antiquated attitudes that they must have "brought it on themselves."

Under Texas law insurance policies are not discoverable in suits against government employees. Section 101.104 Texas Civil Practices and Remedies Code ((b.) "Neither the existence nor amount of insurance is subject to discovery.") McLaren was informed through her attorney of the existence of insurance believed to have been taken out by the City to protect its own interest through an attorney for Special Risks, Inc. (R. 997) The attorney for Special Risks misinformed McLaren's attorney about the insurance coverage claiming, among other things, that it contained an exclusion for criminal offenses. (R. 997) This proved to be false once the contract was obtained following judgment against Taylor as part of the settlement with the City of Bedford, (R. 997 Affidavit of

Frank P. Colosi attached to Roberta McLaren's response to Defendant Imperial Casualty and Indemnity Company's Motion for Summary Judgment.) The City, it turned out was insured by another insurer, Imperial refusing to represent either it or Officer Taylor. (R. 517)

Respondents blatantly misrepresent to this Court that the Petitioner has not argued claims of "sexual harassment" in the Courts below. (Brief in Opposition, p. 4) Beginning with her responses to motions for summary judgment by Imperial Casualty (R. 495), Special Risks (R. 492) and Russell Grace, Inc. (R. 519) and continuing through her Brief before the Fifth Circuit (p. 1-40), Reply Brief (p. 4-19) and her Petition for Rehearing (p. 5-13) Petitioner carries forth the same arguments made to this Court in questions

I, II, IV and VII concerning the issues of course and scope of employment including the constitutional deprivation. (Petition for Rehearing p. 5-13)

II. REPLY TO POINT I THE COURT OF APPEALS CORRECTLY APPLIED TEXAS LAW.

Respondent claims that the Court of Appeals did not find the insurance contract was ambiguous. (Brief in Opposition, p. 4) The Court clearly holds that the contract <u>is</u> ambiguous:

> We remain convinced that, at least in the abstract, the policy language is ambiguous: It is susceptible of at least two interpretations. On the other hand, the language could mean that coverage is narrowly restricted to official law enforcement activity; on the other hand, the wording could be read more broadly as extending coverage to all acts that occur within an uninterrupted series of law enforcement activity.
>
> The dispute in this case centers on the ambiguous terms "within the scope of employment

> or official duties" and "in the regular course of duty." Where we went awry in our original opinion was in stopping at the point of finding ambiguity and thus automatically construing the terms in question against the insurer.

(App. B, p. 10, 11)[2]

The Court clearly finds the contract ambiguous the second time. The panel initially found the contract ambiguous as well. (App. A, p. 14-20)[3].

The Court of Appeals' reliance on the thirty-four year old case of Smith v. M System Food Stores, Inc. 297 S.W.2d 112 (Tex. 1957), a case used by both the District Court and the Court of Appeals

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[2]Petitioner would point out that the cites in her Petition for Certiorari are to the pages in the slip opinions and are thus incorrect cites to the opinions as reproduced in the Appendix. Please accept her apology for any inconvenience this may have caused.

[3]Ibid.

as authority for this holding, is far removed both factually and legally from the case at bar. In Smith, a security guard arrested a shoplifter and then got in an argument with a bystander ultimately assaulting the bystander. The bystander was not involved in the shoplifting and was not under arrest or detention and the Court found, on the facts of that case, that the security guard was reacting to an insult made by the bystander and was not within the course and scope of his employment. The fact that both the District Court and the Court of Appeals would use as their only authority, a case cited only eleven times in thirty-four years (the last cite was seven years ago) and ignore cases directly in point involving sexual abuse and harassment such as Bushell v. Dean,

781 S.W.2d 652, (Tex. App. -- Austin, 1989, rev'd on other grounds, 803 S.W.2d 711 (Tex. 1990) (Sexual harassment by a supervisor, including sexual assault, was within the course and scope of employment.); Nagel Mfg. & Supply Co. v. Ulloa, 812 S.W.2d 78 (Tex. App. -- Austin, 1991, no writ) (A male employee was in the course and scope of his employment and his employer was liable for his sexual harassment and assault of a female co-worker.) Bryson v. State, 807 S.W.2d 742, on remand 820 S.W.2d 197 (Tex. App. -- 13th Dist. 1991); (A police chief who engaged in sexual mistreatment of subordinate was acting under color of his office and in an official capacity, under Section 39.02 Texas Penal Code) indicates the extreme to which both courts had to go in order to deny

Petitioner due process and a jury trial. This Court should note that although the Texas Supreme Court did not rule on the question of course and scope of employment in Bushell v. Dean, it did issue a written opinion, 803 S.W.2d 711 (Tex. 1990) and did not disturb the intermediate courts findings and opinion on course and scope. It is evident that the District Court and the Court of Appeals had to go to great lengths to ignore current Texas cases in point by the very fact that they relied on a thirty-four year old seldom cited opinion with facts far different then those at bar, as the only basis for the denial of due process and a jury trial to the Petitioner.

III. REPLY TO POINT II THERE WAS NO NEED TO CERTIFY A QUESTION TO THE TEXAS SUPREME COURT.

The Respondent inaccurately states that the Petitioner did not request that certain questions be certified by the Court of Appeals to the Supreme Court for the State of Texas. In her Reply Brief to the Court of Appeals, McLaren requested certification as follows:

> The Appellant moves the Court to certify this matter to the Texas Supreme Court on certified question for the determination of Texas law governing the duty to defend; duty to indemnify; interpretation of the proper measure of damages under the duty to defend; the failure to defend; the proper interpretation to be given under the terms and conditions of this insurance policy, and in particular the application of the rule of force and intentional torts such as the case at bar. (Appellant's Reply Brief filed August 26, 1991, p. 22).

The "rule of force doctrine" is a Texas application of the Doctrine of Respondeat

Superior to employers who authorize their employees to use force. Rosales v. American Busline, Inc., 598 S.W.2d 706 (Tex. Civ. App. -- El Paso, 1980, writ ref'd n.r.e.) Under the Rule of Force an employer is held strictly liable for assaults committed by its employees who are permitted to use force in furtherance of the employers business.

Roberta McLaren renewed her request that the Court certify questions of course and scope of employment and limitations in her Petition for Rehearing (p. 14) and in Appellant's Motion to Stay Mandate and Certify Questions to the Texas Supreme Court and/or for Reconsideration, (p. 1-6) and in her Rejoinder to the Response of Special Risks, Inc. to Appellant's Motion to Stay Mandate and to Certify Questions to the

Texas Supreme Court and/or For Reconsideration (p. 2-6).

IV. REPLY TO POINT III THE PETITIONER FAILED TO RAISE THE ISSUE OF DENIAL OF DUE PROCESS AND OBTAIN A RULING ON THAT ISSUE IN THE COURTS BELOW.

Contrary to the contention of Respondent in its Brief in Opposition (p. 6), the Petitioner raised the federal due process issue about the retroactive application of the Murray v. San Jacinto Agency, Inc. 800 S.W.2d 826 (Tex. 1990) statute of limitations rule beginning with Plaintiff Roberta McLaren's response to Defendant Imperial Casualty and Indemnity Company's Motion for Summary Judgment (R. 972, 982) when she argued to the District Court:

> In the event the Court should decide the two year statute of limitation applies as claimed by the Defendant, the Plaintiff would show that the decision of the Texas Supreme Court in

Arnold v. National County Mutual Fire Insurance Company, supra, which was decided only three years prior, in 1987 was relied upon by the Plaintiff and her counsel as being the applicable statute of limitations and said case clearly held that all such causes of action did not accrue until the underlying causes of action had been concluded. Thus, while Plaintiff was relying on the limitation accruing not sooner than June 26, 1991, she filed this action May 15, 1990. Thus, Plaintiff would show that the due process of law under the Texas Constitution as well as the Fourteenth Amendment (emphasis added) to the United States Constitution requires that the Court exercise its discretion based on considerations of fairness and policy grounds, which preclude retroactivity of the new holding to the extent that there was public reliance on the formal rule and the lack of ability to foresee a coming change in the law. The Courts have held that a change in the law would not apply retrospectively to deny a right formerly held by a litigant. Sanchez v. Schindler, 651 S.W.2d 249 (Tex. 1983) (and cases cited therein), Chase Commercial Corporation v.

Datapoint Corporation, 774 S.W.2d 359 (Tex. App. -- Dallas, 1989, no writ).

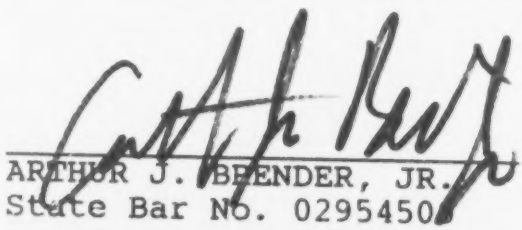
The Sanchez case cites Linkletter v. Walker, 381 U.S. 618 (1965); Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) as authority for the application of the due process clause to the retroactive application of a court decision announcing new law.

Appellant persisted in the Court of Appeals in her Brief (p. 43-48) and Reply Brief (p. 1-8) and Petition for Rehearing (p. 11, 13, 14) in objecting to the fundamental unfairness of the application of the Murray Rule to her cause of action.

## CONCLUSION

Petitioner has properly and accurately represented the record to this

Court and has duly and properly preserved the points of error upon which she relies and requests this Court to consider. The Petitioner respectfully moves this Court to grant her Petition for Certiorari.



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